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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1289

NATIONAL RAILROAD PASSENGER CORPORATION, CENTRAL OF GEORGIA RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY,

Petitioners,

v.

NATIONAL ASSOCIATION OF RAILROAD PASSENGERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent, National Association of Railroad Passengers, petitions for rehearing of the order, decision, and opinions entered January 9, 1974. ___ U.S. ___, 42 U.S.L.W. 4132.

1. Amtrak never operated these trains; Amtrak never announced the discontinuance of the trains; and Amtrak never assumed responsibility for the passenger train service.

The impression created by the court's opinion is that this action was instituted to enjoin a discontinuance by Amtrak of certain Amtrak trains:[1]

> "The respondent, the National Association of Railroad Passengers (NARP), brought this action in the District Court to enjoin the *announced discontinuance* of certain passenger trains that had previously been operated by the Central of Georgia Railway Company (Central) . . .
>
> ". . . Central contracted with Amtrak for the latter to *assume* Central's intercity rail passenger service responsibilities . . .
>
> "The train discontinuances that precipitated this action were announced by Amtrak pursuant to §404(b)(2) of the Amtrak Act, 45 U.S.C. 564(b)(2)."

In actual fact, this is not an action to enjoin any discontinuance by Amtrak, or any announcement of discontinuance by Amtrak. Rather, the action was brought to enjoin the discontinuance of service by Central. It was Central that posted discontinuance notices, effective May 1, 1971, pursuant to section 401(a)(1) of the Amtrak

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[1] This also appears to be the impression of the Reporter of Decisions, as shown in the syllabus.

Act, 45 U.S.C. 561(a)(1). The action below was instituted April 27, 1971 to enjoin Central's proposed discontinuance under section 401(a)(1). At all times, Central operated the passenger trains. Amtrak never operated Central's trains, and never assumed or undertook responsibility for Central's service.

Under the court's apparent theory, Amtrak by contract assumed Central's responsibility for the provision of Central's passenger service; and then Amtrak discontinued the service, pursuant to section 404(b)(2), 45 U.S.C. 564(b)(2), because Amtrak is said to be able to discontinue any passenger service outside the "basic system" on its own initiative.

Section 401 nowhere states that Amtrak is to assume or to undertake Central's responsibility for such service.

Section 401 merely says that the contract *may* be made upon such terms and conditions as necessary to *permit* Amtrak to undertake passenger service on a timely basis. Here, the Amtrak-Central contract, which is of record, expressly states that Amtrak will not undertake any initial service on Central's lines.[2]

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[2] Exhibit C and Appendix B thereto of Memorandum of Defendants in opposition to Plaintiff's Motion for Temporary Restraining Order, filed April 28, 1971 in the U.S. District Court. (S.A. 1). Amtrak's theory of the contracting process is set forth in its Annual Report, reproduced in Hearings on *Administration's Request for Additional Funding for Amtrak*, before Subcommittee on Surface Transportation of Senate Committee on Commerce, 92d Cong., 1st Sess., Ser. No. 92-29 at 118-20 (1971).

Section 404(b)(2) is wholly inapplicable to Central's former service, which it discontinued under section 401(a)(1). Section 404(b)(2) provides no basis for a theoretical discontinuance of a train never operated by Amtrak and for which Amtrak never assumed responsibility.[3] Section 404(b)(2) reads:

> "Except as otherwise provided in this paragraph and in section 403(a) of this Act, service beyond that prescribed for the basic system undertaken by the Corporation upon its own initiative may be discontinued at any time. No such service undertaken by the Corporation on or after January 1, 1973 shall be discontinued until the expiration of the one-year period beginning on the date of enactment of this sentence."

Footnote No. 2 to the court's opinion reads:

> "Except in certain limited situations not here pertinent, 45 U.S.C. 564(b)(2) authorizes Amtrak to discontinue any passenger service, other than that contained in a 'basic system' designated by the Secretary of Transporation, upon its own initiative."

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[3] The notion of a Section 404(b)(2) discontinuance by Amtrak appears to have been first advanced by petitioners upon rebuttal oral argument. It is suggested that Amtrak's brief more aptly describes section 404(b)(2) as governing the discontinuance of service actually provided by Amtrak in excess of the basic system, except that any excess service provided for a continuous period of two years becomes part of the basic system. (Pet. Br., pp. 7-8).

Amtrak never undertook Central's service. Amtrak was required by the specific terms of section 401(a)(1) to tender a contract to Central to *relieve* Central, from and after May 1, 1971, of its entire responsibility for the provision of intercity rail passenger service, but that contract provided that Amtrak would not undertake any initial service on Central's lines.

Whether the discontinuance of the "Nancy Hanks" is termed a Central discontinuance and/or an Amtrak discontinuance is of considerable importance.[4]

The court in its opinion (pp. 8-11) lays great stress upon the importance of upholding the supposed legislative intent of allowing Amtrak a wide latitude of discretion with regard to discontinuances and changes of train service. The court apparently felt that this legislative policy would be compromised by allowance of private actions such as the present. But we are not complaining about a discontinuance by Amtrak. The legislative history is devoid of any indication that shielding railroads (as distinct from Amtrak) from private actions for violations of the Amtrak Act was in any way essential to effectuate the purpose of the Act.

The interpretation given section 307(a) by U.S. Secretary of Transportation, John A. Volpe, was that railroads were already covered by existing statutes, such that section 307(a) is surplusage as to private railroads. Indeed, the court's opinion gives great weight otherwise to Secretary

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[4] See also: *In Re Penn Central Transportation Company*, 329 F. Supp. 572 (E.D. Pa. 1971).

Volpe's views during the drafting process. Secretary Volpe said:[5]

> "With respect to inclusion of all railroads within the reach of the section, it should be noted that existing statutes apply to them. To an extent the Corporation is exempt from such statutes or statutory requirements. Consequently, I am not sure it would be necessary to make sanctions applicable to any railroad. This is particularly so here where such sanctions expressly reach 'any action, practice, or policy'. The Corporation has a quasi-public character in many respects and the scope of the sanctions with respect to it is appropriate. There is no comparable situation, however, with respect to railroads generally."

This action was brought to enjoin the discontinuance of trains by Central, and not the announced discontinuance or discontinuance by Amtrak. Accordingly, whatever the interest of Congress is with respect to private actions against Amtrak, Congress did not intend to preclude private actions against railroads.

2. The discontinuance by Central is contrary to the laws of Georgia.

The court's opinion states that respondent has pointed to no provision of law outside the Amtrak Act for relief.

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[5] Supp. Hearings on H.R. 17849 and S. 3706 before Subcommittee on Transportation and Aeronautics of House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Ser. No. 91-62 at 85 (1970).

> "The respondent has pointed to no provision of law outside the Amtrak Act itself that can be read to create or imply the cause of action that it seeks to bring against the petitioners. It follows that support for the bringing of this action must be found, if at all, within the four corners of that Act."

On the contrary, our brief pointed out that train discontinuances are subject to state law. (Resp. Br., p. 26, fn. 58):

> "Apart from Rail Passenger Service Act of 1970, discontinuance of the "Nancy Hanks" would be barred by section 93-307 of the Georgia Code, and Railroad Passenger Rule No. 18 of the Georgia Public Service Commission, without prior approval by the State agency."

Section 307(b) of the Amtrak Act provides:

> "Nothing contained in this section shall be construed as relieving any person of any punishment, liability, or sanction which may be imposed otherwise than under this Act."

The notices posted and filed by Central pursuant to section 401(a)(1), announcing discontinuances effective May 1, 1971, did not act to invoke the substantive jurisdiction of the Interstate Commerce Commission, so as to supersede the laws of Georgia. This is because the reference in section 401(a)(1) is only to the notice procedures of section 13a(1) of the Interstate Commerce Act. See: Ex Parte No. 217, 36 Fed. Reg 5219, 5220 (March 18, 1971); 49 C.F.R. 1122.9.

3. The Amtrak Act provides for administrative remedies for aggrieved persons upon discontinuance of most Amtrak trains.

The court infers (pp. 8-11) an intention by Congress to permit Amtrak to avoid the time-consuming process of hearings before State regulatory bodies or the Interstate Commerce Commission in order to discontinue or change its train service. Accordingly, the court does not see that the judicial process should be used as a substitute for the former administrative proceedings, and that an injunction *pendente lite*, forcing Amtrak to continue "uneconomic" service, would undercut the efficient apparatus for the "paring of uneconomic routes."

It is respectfully suggested that the exact opposite is the true situation. Virtually all train discontinuances by Amtrak are now subject to state or I.C.C. hearings. This is because Amtrak has been in operation for over two years, with the result that most of its service is now "basic system", and cannot be discontinued without recourse to the I.C.C. or state agencies. Section 404(b)(3), 45 U.S.C. 564(b)(3).[6] Moreover, P.L. 93-146, signed November 3, 1973 (prior to argument on November 12), placed further restrictions on discontinuances by Amtrak. Indeed, the U.S. Secretary of Transportation had recommended changes in the Amtrak so as to eliminate such administrative proceedings and judicial review.[7] The Congress rejected the Secretary's recommendations.

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[6] See definition of "basic system" in section 102(4), 45 U.S.C. 502(4), and the provision for "excess service" in section 403(a), 45 U.S.C. 563(a).

[7] See: Exhibit A to Brief for Petitioners, at pp. 104-5, 107-8.

Since the Congress desires to have the Amtrak program kept under state and I.C.C. control, with the right of judicial review, *City of Chicago v. United States*, 396 U.S. 162 (1969), it is only natural to infer judicial remedies in those few instances not covered by administrative proceedings.

4. Mandamus has been denied to Respondent in an analogous situation.

Mr. Justice Brennan, in his concurring opinion, suggests that respondent might maintain an action for mandamus in lieu of the action brought below. However, the U.S. Court of Appeals for the D. C. Circuit denied mandamus in a train discontinuance proceeding. *National Association of Railroad Passengers v. Mitchell*, (No. 72-1192).

Accordingly, respondent would not have an effective remedy if the instant opinion is allowed to stand.

CONCLUSION

For the reasons set forth, respondent prays that this Court grant rehearing of the order, decision, and opinions of January 9, 1974.

Respectfully submitted,

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February 1974

CERTIFICATE OF COUNSEL

As counsel for the respondent, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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Counsel for Respondent